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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-302

DEUTSCHE DAMPFSCHIFF. GES. "HANSA",
Petitioner,

v.

CUMMINS SALES & SERVICE, INC.,
Respondent,

LONDON & OVERSEAS INSURANCE COMPANY
and PROVINCIAL INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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Poor on Charter Parties and Ocean Bills of Lading by Wharton Poor (Fourth and Fifth Editions), published by Matthew Bender & Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Deutsche Dampfschiff. Ges. "Hansa" prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 21, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (John V. Singleton, Jr., U.S.D.J.) is unreported and is printed in the supplement beginning at page 1.

The opinion of the United States Court of Appeals for the Fifth Circuit (Circuit Judges Gewin, Thornberry and Clark), printed in the supplement beginning at page 6, is reported at 476 F.2d 498.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on March 21, 1973. Petitions for rehearing and rehearing en banc were denied on May 17, 1973 and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S. Code § 1254(1).

QUESTIONS PRESENTED

(1) Whether a shipowner is estopped from proving the actual condition of goods upon delivery to his vessel by or on behalf of a shipper who previously had purchased the goods without reliance upon a receipt or a bill of lading?

(2) Where the condition of goods cannot be ascertained by visual inspection because they are contained within crates, boxes and cartons, may a shipowner be held liable in the absence of any proof whatsoever of the good condition of said contents at, or at any time prior to, delivery to the shipowner?

(3) What measure should be applied to establish damages in a case where goods which were designed for use in Libya are removed to Houston from Libya, solely for political reasons, and the owner of such goods is conducting, in essence, a salvage operation with respect to goods that were not wanted or needed in Houston?

STATUTE INVOLVED

The statute involved is the Carriage of Goods by Sea Act, 46 U.S.C. Sec. 1300 et seq., the United States codification of the Hague Rules which have been adopted by all maritime nations.

The decision of the Court below does not relate to a specific provision of the Act, other than the rebuttability of 1303(4), but concerns decisional law by the courts of this country, and abroad, relating to negotiable instruments and the law merchant regarding cargo shipped in international trade pursuant to the Hague Rules as embodied in that Act.

THE STATEMENT OF THE CASE

It is undisputed that on or before March 30, 1967, Cummins Sales & Service, Inc. (hereafter "Cummins") acquired title to, and an unconditional obligation to pay for, the component parts of a prefabricated building to be erected in Libya.

The goods consisted of 276 packages of structural steel components, including I-beams, trusses, angles and other construction materials. The building, when erected, would measure 256′ 8″ length, 75′ 0″ width and 20′ 6″ height. Except for the structural steel, such as I-beams, the construction materials were contained within 80 closed crates, boxes and cartons.

On or about March 3, 1967, the 80 crates, boxes and cartons were stowed on an uncovered barge anchored in Tripoli Harbor 200′ to 300′ off the breakwater, and the structural steel was kept in an open area of the dock.

It is also undisputed that the goods remained on the uncovered barge in Tripoli Harbor and on an exposed area of the dock, without being covered by tarpaulins or any other protective material, from March 3, 1967 to May 6, 1967. In the meantime, Cummins made arrangements

through the manufacturer of the components, Taylor Woodrow (Building Exports) Limited, to have the latter's agent at Tripoli, T. Gargour & Fils (Tripoli), Ltd., to act as agent for Cummins in arranging for the reshipment of the components from Tripoli to Houston for Cummins' account.

Petitioner's vessel, the M/S GOLDENFELS, arrived at the Port of Tripoli on May 6, 1967 and the goods were loaded aboard that vessel on May 6 and 7, 1967, approximately five or six weeks after Cummins had purchased them.

The crates, boxes and cartons which had been stowed on the barge in Tripoli Harbor were brought to shipside in trucks and were loaded directly from the trucks into the vessel, which indicates a transfer from the barge to trucks before being brought shipside.

The structural steel which had been kept in open storage on the dock was brought alongside the vessel on a barge, which indicates a transfer from the dock to a barge before delivery to the vessel.

The Chief Officer of the GOLDENFELS, Mr. Robert Maringer, appeared as a witness at the trial of the action.

The District Court permitted a proffer of Mr. Maringer's testimony, so that same would appear of record, but stated that such testimony would not be considered for any purpose (T. 684-686, 687).

Mr. Maringer offered testimony to the effect that the structural steel was badly stowed on the barge, was dusty and rusty, and several beams were bent or dented. The structural members on the barge were all mixed up and, therefore, the barge had to be shifted back and forth alongside the GOLDENFELS while selecting the heavier pieces for loading first and thereafter the lighter pieces.

The Chief Officer had a conversation with T. Gargour & Fils (Tripoli) Ltd.'s clerk concerning the description of the shipment to be placed on the bill of lading. The shipment appeared to the Chief Officer to be that of used oil field equipment.

The testimony offered on behalf of Petitioner was excluded from evidence and the District Court held, in effect, that the bill of lading issued by T. Gargour & Fils (Tripoli) Ltd. precluded Petitioner from offering evidence as to the history of the goods in Tripoli Harbor for over two months preceding delivery to the GOLDENFELS. Further, the District Court did not require any evidence whatsoever as to the condition of the goods enclosed within 80 crates, boxes and cartons.

The contents of the crates, boxes and cartons were first examined about three months after discharge from the GOLDENFELS, during which time they were lying in an open field in a staging area in Houston. A marine surveyor who examined the goods at that time testified that all damaged components could be either repaired or replaced at a maximum cost of $10,690.00 regardless of when or where the damage occurred, which amount included approximately $2,500.00 "aggravated" damage caused by exposure to the elements while lying unprotected in the staging area.

Cummins filed on April 10, 1968, an action in the United States District Court for the Southern District of Texas against the Institute of London Underwriters and its member companies, London & Overseas Insurance Company and Provincial Insurance Company (hereafter "Underwriters")* to recover $80,000.00 for an alleged constructive total loss of the shipment which was insured by an all-risk policy issued by those defendants, and which was effective

* Upon motion of the Institute of London Underwriters, joined in by all parties, the Court of Appeals, by Order dated April 5, 1973, changed the style of the case to eliminate further reference to it as a party to the litigation.

from the time the building components left the warehouse of the manufacturer in England to the time of arrival at Tripoli, Libya and was thereafter extended to cover reshipment from Tripoli to Houston.

Joined as a defendant was "Hansa", as owner of the M/S GOLDENFELS, on a claim of cargo damage while in its custody and control. Plaintiff alleged that the cargo was delivered to the GOLDENFELS in Tripoli on May 5, 1967 in good order and condition but outturned at Houston in damaged and unserviceable condition, and further alleged that the shipowner was presumptively liable for either unseaworthiness of the vessel or negligence.

The Underwriters denied liability to Cummins under the terms and conditions of the cargo insurance policy and filed a cross-complaint against "Hansa" to assert subrogation rights in the event Underwriters should be held liable to plaintiff.

"Hansa" filed a third-party complaint against a Houston stevedore, Gulfwide Stevedores, Inc., to recover indemnity in the event "Hansa" should be held liable for damage, if any, during discharge at Houston.

The case was tried, non-jury, before Hon. John V. Singleton, Jr. U.S.D.J., commencing on June 2, 1969. The District Court had admiralty jurisdiction on a claim for the proceeds of a policy of ocean cargo insurance and for cargo damage.

At the conclusion of the trial on June 5, 1969, after all parties rested, the Court held that Cummins was entitled to recover $26,730.64*, plus an undetermined amount for miscellaneous matters; that if Underwriters paid the judgment, they would be entitled to reimbursement from "Hansa", and that "Hansa" was entitled to recover $2,500.00 from Gulfwide Stevedores, Inc.**

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* The judgment reads $26,730.70

** Gulfwide Stevedores, Inc. was not involved in any of the appellate proceedings.

Final judgment was entered in the District Court on June 17, 1969.

"Hansa" filed on July 15, 1969 its appeal to the United States Court of Appeals for the Fifth Circuit which was followed by cross-appeals by Cummins on July 18, 1969 and by Underwriters on July 25, 1969.

The appeals were originally reached for oral argument on May 12, 1970 but the case was remanded to the District Court "in order that it may find the facts specially and state separately its conclusions of law thereon, as required by Fed. R. Civ. P. 52(a)." (Opinion June 1, 1970).

The District Court thereafter filed on March 31, 1972, its "Memorandum and Order" which contains its findings of fact and conclusions of law, and in which the Court noted that "4. Judgment in accordance with the above findings of fact and conclusions of law was entered by this Court on June 17, 1969".

The Court of Appeals on March 21, 1973 affirmed the judgment in respect of liability but reversed and remanded for further proceedings as to computation of damages. Petitions for rehearing and rehearing en banc were denied on May 17, 1973.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Fifth Circuit is in direct conflict with decisions of this Court and decisions of the Second and Ninth Circuits, and is directly in conflict with well settled law as applied and followed in the courts of this country as well as the courts of other maritime nations.

Wharton Poor, whose book "Poor on Charter Parties and Ocean Bills of Lading" is considered the leading treatise on the subject, states the law to be (Fourth Edition, Sec-

tions 59 and 60, Page 132 et seq.) that, as between the original parties, a bill of lading functions as a receipt, not as a negotiable instrument, and that a shipowner may introduce evidence to show the actual condition of cargo at the time of delivery to the vessel. In such instance, the shipper does not rely upon representations made in a bill of lading as an inducement to purchase goods.

Poor reiterated the same principles of law in the Fifth Edition of his work on Charter Parties and Bills of Lading, and he cites in support thereof the cases of *Nelson v. Woodruff*, 1 Black 156, 17 L. Ed. 97; *Ship Howard v. Wissman*, 18 How. 231, 15 L. Ed. 363; *Witzler v. Collin*, 70 Me. 290; The DONDO, 287 Fed. 239; and *Amerlux v. Johnson Line*, 33 F.2d 70.

Henry N. Longley, another well known writer on the subject of bills of lading, states in "Common Carriage of Cargo", p. 21 that:

> "The cases make it clear that the principle (of estoppel) is only applicable when the consignee has purchased the cargo or the bill of lading in reliance on a false acknowledgement in the bill of lading, to his detriment." (citing the CONCORDIA STAR, 250 F.2d 867; the CARSO, 53 F.2d 374; the BOVERIC, 1924 A.M.C. 1045 (S.D. N. Y.); the PAN AMERICA, 6 F.Supp. 374).

Other authorities include *Stromeyer & Arpe Co. v. American Line S.S. Corporation*, 99 F.2d 360 (2 Cir., 1938); *Mannell v. Luchenbach SS Co.*, 26 Fd2d 908 (W. D. Wash., 1928); *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 155 F.Supp. 886 (S. D. N.Y., 1957) aff'd 265 F.2d 418 (2 Cir. 1958); *Plata Am. Trading, Inc. v. Lancashire*, 214 N.Y.S.2d 43; *The Dondo*, 287 Fed. 239; *The Concordia Star*, 250 F.2d 867 (2 Cir., 1958).

The rule is otherwise where a bill of lading is purchased by a bona fide transferee for value in reliance

on the statements contained therein, but even in that instance the purchaser must prove the condition of the contents of boxes, crates and cartons at the time of delivery to the vessel. *THE CARSO,* 53 F.2d 374 (2 Cir., 1931).

Cummins having acquired title to the goods, and the obligation to pay for them, on March 30, 1967, two months before loading aboard the GOLDENFELS, it was error for the District Court to refuse to consider evidence of their condition at time of delivery to the vessel in Tripoli on May 6 and 7, 1967.

The principle here involved is illustrated in *Freedman v. M/V CONCORDIA STAR, et al.,* 1958 A.M.C. 1308, 250 F.2d 867 (2 Cir., 1958). Two bills of lading were issued by the M/S CONCORDIA STAR for 121 barrels of skins shipped from Iran to Hoboken, New Jersey. The bills of lading acknowledged receipt "in apparent good order and condition" but upon outturn were found to be "not in good order and condition".

The Chief Mate testified at the trial that the barrels of skins were in poor condition, stained, with loose staves and that the bottoms and tops of the barrels were partly loose. The District Court held the shipowner estopped from showing the condition of the cargo upon delivery to the vessel because of the "clean" bills of lading.

The sole question presented on appeal was whether the District Court committed error in applying the doctrine of estoppel on the facts disclosed by the record.

Mr. Noah Freedman testified at the trial that "I bought the skins"; that upon arrival of the shipment he examined the skins with Mr. Posen, who represented the Iran Overseas Corporation and told him "I can't accept the skins in this condition. I bought sound skins".

The Circuit Court stated that "making advances or giving a note in reliance upon the bill of lading are established grounds for estoppel". But noted that in the case at bar,

"Freedman Brothers had parted with nothing" in reliance upon the bills of lading.

The decree was reversed and the case remanded with instructions to dismiss as against the shipowner and the shipowner's agent.

In this case, Cummins purchased on or before March 30, 1967, the component parts for a prefabricated building without reliance on a bill of lading from the GOLDENFELS.

The decision of the Circuit Court is also in direct conflict with the decision of the Ninth Circuit in *Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co.*, 366 F. 2d 333 (1966). The Ninth Circuit reversed the District Court for its failure to require the holder of a bill of lading to prove the actual condition of goods upon delivery to the vessel. This was because the holder of the bill did not acquire goods by purchasing a bill of lading representing those goods. The goods had been sold on an "open account" basis and not in reliance upon a bill of lading.

By no stretch of the imagination can it be said in this case that Cummins was induced by, or in any way relied upon, a bill of lading issued by or allegedly on behalf of the GOLDENFELS because, and there is no dispute as to this fact, Cummins became the owner of the goods on or before March 30, 1967 and the bill of lading was not even issued until May 6, 1967.

Cummins was therefore legally required to establish at the trial the condition of the goods upon delivery to the GOLDENFELS on May 6-7, 1967, and the GOLDENFELS was entitled to an opportunity to rebutt and show their actual condition on such delivery. The District Court, however, did not require plaintiff to prove the condition of the shipment and, additionally, refused to receive evidence from the Chief Officer as to their actual condition.

Further, if knowledge as to the condition of the goods were material to Cummins, such knowledge should have been imputed to Cummins through its agent T. Gargour & Fils (Tripoli) Ltd. whose representative discussed the matter with the Chief Officer of the vessel. The bill of lading was signed by Gargour, not by the Master of the vessel.

II.

The Court of Appeals has either misapplied the law or has injected a totally unwarranted and new concept relating to documents used in international shipping.

The Court below may have lead itself into error by use of the word "assumed" in the third full paragraph appearing at 476 F.2d 498, 499, which reads:

> "On March 30, 1967, while the cargo remained at Tripoli harbor, Cummins, for reasons not material to the instant appeal, assumed Mid-East's obligation to purchase the building, in return for Taylor Woodrow's arranging to re-ship the building to Cummins in Houston."

The goods had been shipped from London to Tripoli aboard the *SS Walter* pursuant to a CIF contract between the seller, Taylor Woodrow, to the buyer, Mid-East, which had become the owner of the goods. The *SS Walter's* bill of lading and the CIF contract was not assigned to Cummins. Mid-East and Taylor Woodrow cancelled their contract. Simultaneously, Taylor Woodrow and Cummins entered into a contract in which the goods were resold to Cummins.

Cummins did more than just "assume" Mid-East's obligation to Taylor Woodrow.[1] Cummins actually pur-

[1] There are numerous misstatements of fact in the opinion. There was no testimony as to condition of the cargo upon discharge from the SS *Walter* (P. 489) and the master of the *Goldenfels* did not testify (P. 500).

chased the goods on March 30, 1967 and was unconditionally bound to pay for them regardless of their condition upon arrival at Houston. Cummins might have relied upon the *SS Walter's* bill of lading as an inducement to make the purchase but it could not and did not rely upon the May 7th bill of lading purportedly issued on behalf of the *Goldenfels*.

The *Goldenfels'* bill of lading functioned, as a matter of law, only as a receipt for goods and a contract of carriage as between original parties; not as a negotiable instrument purchased by a bona fide holder in due course.

The Court of Appeals made it clear in the opinion that the goods were being "reshipped", which is what the parties contracted for, when Cummins purchased them, paid 25% down and agreed to accept, upon presentation, sight drafts for the balance due.

The condition of the goods upon arrival in Houston made not one whit of difference to the legal obligation from Cummins to Taylor Woodrow as those goods were purchased (or an obligation was "assumed") in Tripoli on March 30, prior to issuance of the *Goldenfels'* receipt. Cummins parted with nothing of value which it was not already obligated to give when it received the *Goldenfels'* receipt on May 24 to enable Cummins to demand from the *Goldenfels* possession of its goods.

The effect of the decision of the Court below is to introduce uncertainty into an area of law which, up to now, has been clear, and it is in conflict with decisions of this Court, cited by Mr. Poor, and with decisions of the Second and Ninth Circuits.

The present decision can be cited for the proposition that, upon a new and unrelated reshipment of goods, the carrier is bound by a document which was not even in existence at the time the "assumption" of obligations was made. This is clearly not the law between existing parties to a contract of affreightment.

THE ISSUE IS OF SUBSTANTIAL IMPORTANCE TO THE INTERNATIONAL SHIPPING INDUSTRY

Petitioner would not hazard a guess as to how many million bills of lading are issued in a year. However, thousands of ships ply international waters and the number of bills of lading issued for the cargo they carry is indeed substantial.

The shipping community relies upon standardized customs and uniform legislation such as the Carriage of Goods by Sea Act for the orderly conduct of business.

The law is well established, here and abroad, that the doctrine of estoppel is available only to a bona fide purchaser for value who relies upon statements contained in a bill of lading to induce him, to his detriment, to purchase goods represented by such bill of lading.

CONCLUSION

These questions are of vital importance to shippers and shipowners alike and, therefore, Petitioner respectfully prays that its petition for a writ of certiorari be granted.

August 14, 1973.

Respectfully submitted,

Robert M. Julian
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing petition have been served upon respondents by mailing copies thereof to Philip C. Wrangle and B. D. McKinney, Baker & Botts, and to Jon W. Montague, Eastham, Watson, Dale & Forney, counsel for respondents, on August 14, 1973, in securely sealed, postage prepaid envelopes, correctly addressed to their respective addresses of record.

Robert M. Julian

IN THE

United States Court of Appeals

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 68-H-323

CUMMINS SALES & SERVICE, INC.

v.

THE INSTITUTE OF LONDON UNDERWRITERS, ET AL and DEUTSCHE DAMPFSCHIFF GES. "HANSA"

(Filed March 31, 1972)

MEMORANDUM AND ORDER

Cummins Sales & Service, Inc. (hereafter Cummins) filed this civil action on April 10, 1968, against the Institute of London Underwriters and its member companies, London & Overseas Insurance Company and Provincial Insurance Company (hereafter Underwriters) and against Deutsche Dampfschiff Ges. "Hansa" (hereafter Hansa) to recover damages for an alleged constructive total loss to a shipment of component parts of a prefabricated building insured by an all-risk policy of cargo insurance issued by the Underwriters and carried in the M/V Goldenfels from Tripoli, Libya, to Houston, [2] Texas, in May-June, 1967.

Cummins alleged that the cargo was delivered to the GOLDENFELS in Tripoli on May 7, 1967, in apparent

good order and condition and that it was discharged in a damaged condition in Houston on June 26, 1967. Cummins claimed that the shipowner was presumatively liable for the provable damages to the cargo.

The Underwriters denied that the cargo was a constructive total loss under the terms and conditions of the policy and filed a cross-complaint against Hansa to assert subrogation rights for any partial loss which they might be required to pay under the cargo policy.

The evidence reveals that on August 1, 1966, Mid-East Supply Company, S.A.L. purchased the metallic building from Taylor, Woodrow, Ltd. of London for £17,522. The building was shipped by Taylor, Woodrow from London aboard the SS WALTER to Tripoli under three bills of lading, all of which were issued without exceptions as to pre-shipment condition. The plaintiff herein thereafter [3] assumed the assets of Mid-East Supply Company S.A.L. and determined during the course of the voyage to Tripoli that it wished to have the cargo transshipped from Tripoli to Houston.

The SS WALTER arrived in Tripoli and discharged her cargo without any visible damage.

Pursuant to the contract of purchase of the building, Taylor, Woodrow, Ltd. agreed to arrange for the transshipment of the building from Tripoli to Houston as desired by Cummins. On May 6 and 7, 1967, the building parts were loaded on board the SS GOLDENFELS under Hansa's bill of lading No. 6. The bill of lading was issued without any relevant exceptions as to preshipment condition.

After the cargo was shipped from Tripoli, the subject bill of lading was forwarded to the Republic National Bank in Dallas, Texas, and negotiated to Cummins Sales & Service in due course. When the cargo was discharged in

Houston on June 26, 1967, considerable damage was discovered and appropriate notices were given to the [4] Underwriters and vessel owner. Thereafter, all interested parties employed marine surveyors in an effort to establish the extent of the damage to the cargo, but there were considerable differences of opinion among the surveyors concerning the extent of the damage.

The building was shipped in 276 pieces consisting of steel trusses, beams and packaged accessories. All of the steel sections were uncrated and out of the 276 pieces in the shipment, 196 were uncrated. The remaining 80 components consisted of wall board, sheet-rocking, glass windows and other minor accessories packaged in crates and cartons. The evidence indicated, and the court so finds, that the crates and cartons were smashed and crushed at the time they were delivered to Houston. Such was obviously not the condition of the containers at the time they were delivered to the GOLDENFELS in Tripoli since the chief mate on the GOLDENFELS stated very carefully that at that time, he saw only one crate with apparent exterior damage.

The defendant Underwriters denied that the damage to the cargo constituted a constructive total loss within [5] the meaning of the insurance policy and both defendants denied that the damages to the building were as extensive as claimed by the plaintiff. The vessel owner attempted to introduce some evidence of preshipment damage at Tripoli. The court finds that this evidence in its most favorable light concerned only minor and insignificant damage to some of the building components which did not affect the commercial value of the shipment at that time. The real question before the Court is the extent of the damage to the cargo and the amount of recovery to be allowed to the plaintiff.

[4]

The defendant Underwriters had issued a "valued" cargo policy on the shipment which was in effect at all material times. The agreed value of the shipment as stated in the policy was £ 19,765. The court finds that the plaintiff failed to prove that there was a constructive total loss as against the insurance company and the court will only allow a judgment to the plaintiff in the amount of the actual damages sustained due to the physical loss [6] to the cargo. As stated, the opinions of the surveyors and others in the steel building erection business varied considerably. The most credible opinion given in this regard was introduced through the testimony of Lewis J. Howard, District Manager for Stran Steel Corporation in the Gulf Coast area. He testified that he examined the cargo after its arrival and that in his opinion, approximately 75% of the pieces had been damaged to some extent from very minor damage to total loss. The cost of repairs would have been less than 75% of the cost of the building but as Cummins did not have the building repaired, the actual cost of repairs could not be stated. However, the court finds that Mr. Howard's estimate is the best place to begin, less, of course, a factor for salvage. It was undisputed that during the pendency of this suit plaintiff was able to sell the cargo for $11,000. Accordingly, based on Mr. Howard's testimony less salvage, the court finds actual damages sustained during the voyage to be $26,730.70 which is 75% of the original cost of $50,307.60, or $37,730.70 [7] less $11,000. The court further finds that plaintiff is entitled to the sum of $500 for incidental handling damages plus interest at the rate of 6% per annum from June 26, 1967, until paid.

CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against defendant Underwriters in the amount of $27,230.70 plus interest at the rate of 6% per annum from June 26, 1967, until paid.

2. The cargo was shipped aboard the M/V GOLDENFELS in apparent good order and condition and it was discharged in a damaged condition. Therefore, a rebuttable prima facie case of liability was established against Hansa, the vessel owner. Hansa, however, did not bring itself within one of the statutory exemptions or immunities from liability contained in the governing statute which was stipulated to be Title 46, U.S.C.A., Section 1300-1315, the United States Carriage of Goods by Sea Act, or otherwise prove its freedom from fault for the damages [8] which occurred on the GOLDENFELS and the evidence failed to support Hansa's contention that all of the damage was of preshipment origin. In failing to rebut the presumption of liability, and in not proving the extent that preshipment damage, if any, contributed to the overall loss, Hansa is liable to plaintiff and/or its subrogated insurers for the full amount of the damage. Underwriters are, therefore, entitled to recover over and against the vessel owner any amounts that they are required to pay to the plaintiff as aforesaid.

3. All court costs are to be taxed jointly and severally against the defendants with the defendant Underwriters having the right of recovery for any costs paid by them over and against the defendant vessel owner.

4. Judgment in accordance with the above findings of fact and conclusions of law was entered by this court on June 17, 1969.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28600

CUMMINS SALES & SERVICE, INC.
Plaintiff-Appellee-Cross Appellant,

versus

THE INSTITUTE OF LONDON UNDERWRITERS, ET AL,
Defendants-Appellees-Cross Appellants,

DEUTSCHE DAMPFSCHIFF. GES. "HANSA",
Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Texas

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(March 21, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: Cummins Sales and Service, Inc., brought this suit in admiralty to recover for damage to cargo that was insured by defendant Institute of London Underwriters and its member companies ("Underwriters") and that was shipped from Tripoli, Libya, to Houston, Texas, aboard the M/S GOLDENFELS, a vessel owned by defendant Deutsche Dampfschiff. Ges. "Hansa" ("Hansa"). On an earlier appeal from a judgment for Cummins against Underwriters

and for Underwriters over against Hansa, this court remanded for entry of findings and conclusions. We now affirm the judgment as to liability but remand for a redetermination of damages.

The cargo in question was the component parts of a prefabricated metal building. In January 1967, Mid-East Supply Company, a Libyan corporation forty-nine percent of whose stock was controlled by a Cummins affiliate, contracted to purchase the building from a British concern, Taylor Woodrow, Ltd. Terms of the sale were twenty-five percent cash against documentary sight drafts, with the balance to be paid in four equal six-month installments. Taylor Woodrow shipped the building, in the form of 276 packages, to Mid-East in Tripoli aboard the SS WALTER, which arrived in Tripoli on March 3, 1967, and discharged the cargo in good order and condition. Those components which were in boxes and crates were stowed in an uncovered barge in Tripoli harbor, while the structural steel components were stowed on the dock in the open.

On March 30, 1967, while the cargo remained at Tripoli harbor, Cummins, for reasons not material to the instant appeal, assumed Mid-East's obligation to purchase the building, in return for Taylor Woodrow's arranging to re-ship the building to Cummins in Houston. Acting on instructions from Taylor Woodrow, T. Gargour & Fils, Ltd., the Tripoli firm which had handled the shipment on the outward voyage from London, made arrangements for reshipment aboard the GOLDENFELS. After the cargo had been loaded aboard the GOLDENFELS on May 6-7, 1967, T. Gargour & Fils issued a Hansa bill of lading covering the cargo. Although the master of the GOLDENFELS did not sign the bill of lading, it was issued on a Hansa form with the master's knowledge. With two minor exceptions not relevant here ("one drum short shipped"; "one crate broken, contents loose"), the bill of lading was

"clean": there was nothing in the bill of lading to suggest that the cargo was not taken aboard the GOLDENFELS in good order and condition.

After intermediate stops, the GOLDENFELS reached Houston and discharged her cargo on June 26, 1967. In the meantime, on April 24, 1967, Cummins had paid Taylor Woodrow the twenty-five percent down payment which was then overdue from Mid-East. And on May 24, 1967, while the cargo was still enroute from Tripoli, Cummins accepted sight drafts with the clean bill of lading attached, and agreed to pay them at six-month intervals over two years.

When the cargo was discharged at Houston, it was damaged. Although Cummins claimed a constructive total loss under Underwriters' policy of insurance, the marine surveyors employed by Cummins denied that the cargo was a constructive total loss, and estimated the damage at between $10,690 and $12,500. A construction company executive, Mr. L. J. Howard, testified by deposition that the damage amounted to "seventy-five percent of the cost of the building"; but later in the deposition, Howard stated that the seventy-five percent figure did not represent a monetary estimate of the cost of repairs or replacement, but was only an estimate of the number of components that had suffered any damage, ranging from minor damage to complete destruction. In addition, a marine surveyor employed by Hansa estimated the maximum damage at $20,000. Cummins did not attempt to repair or replace the damaged components, and was able to salvage them for only $11,000, in mid-1969.

After awarding judgment for Cummins, the trial court computed damages by multiplying the revised sale price of the building ($50,307.60) by seventy-five percent (the figure supplied by Mr. Howard), and by subtracting from the resulting figure the $11,000 in proceeds from the salvage sale. Judgment was entered for $26,730.70, together with

$500 incidental expenses, plus interest and costs. On appeal, Hansa challenges the determination of the liability question favorably to Cummins, and is joined by Underwriters in contending that the damages awarded were excessive. Cummins, on the other hand, contends that the damages awarded were too low.

In order to make a burden-shifting *prima facie* case under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § § 1300-1315, Cummins had to show receipt of the cargo by the carrier in good condition and arrival of the cargo at Houston in damaged condition. *Dempsey & Associates v. S. S. SEA STAR,* 9th Cir. 1972, 461 F.2d 1009; *Daido Line v. Thomas P. Gonzales Corp.,* 9th Cir. 1962, 299 F.2d 669; *Mamiye Bros. v. Barber Steamship Lines, Inc.,* S.D.N.Y. 1965, 241 F.Supp. 99, *aff'd,* 2d Cir., 360 F.2d 774, *cert. denied,* 385 U.S. 835, 87 S.Ct. 80 (1966). The damaged condition of the cargo upon its outturn at Houston is not questioned; and the clean bill of lading covering the cargo shipped on the GOLDENFELS is sufficient proof, for purposes of Cummins' *prima facie* case, of receipt of the cargo by the carrier in good condition. *Dempsey, supra; Daido Line, supra.* Although Hansa argues that Gargour & Fils, who actually issued the bill of lading on a Hansa form and who signed it, had no authority to do so from the master of the GOLDENFELS, the master's testimony contains no suggestion that Gargour & Fils had no authority to issue the bill of lading.

Hansa attempted to rebut this *prima facie* showing by offering evidence that the cargo had suffered extensive damage through improper stowage and exposure to the elements at Tripoli before being loaded aboard the GOLDENFELS, but the trial judge refused to consider any evidence of pre-shipment damage. In defense of this ruling, Cummins and Underwriters invoke the principle that a carrier is estopped from impeaching a clean bill of lading

in a suit by one who has given value in reliance on the bill of lading. *See, e.g., Pacific Micronesian Lines, Inc. v. New Zealand Insurance Company*, 9th Cir. 1966, 366 F.2d 333; *The CARSO*, 2d Cir. 1931, 53 F.2d 374. Cummins claims that it gave value in reliance on the bill of lading when, on May 24, 1967, while the cargo was still enroute to Houston, it accepted sight drafts with the clean bill of lading attached.

In support of its claim that this principle of estoppel does not apply to the instant case, Hansa advances three arguments. First, it contends that Gargour & Fils was acting as Cummins' agent in arranging for re-shipment aboard the GOLDENFELS and that Gargour & Fils' knowledge of the condition of the cargo when it was loaded aboard the vessel is attributable to Cummins as principal. The record, however, does not support this assertion. It is not clear exactly whose agent Gargour & Fils was. In a March 29, 1967, letter to Cummins, Taylor Woodrow referred to Gargour & Fils as 'the Tripoli agents of the steamship company [Transmarin] which carried the [building] on the outward shipment," and it is conceivable that Gargour & Fils was Hansa's Tripoli agent as well. It is clear, however, that Gargour & Fils acted on instructions from Taylor Woodrow, not from Cummins. Secondly, Hansa points out that the terms of *Mid-East's* contract with Taylor Woodrow were "C.I.F. - Tripoli," and that Mid-East thus took title to the prefabricated building in London during February 1967. The thrust of this argument is somewhat unclear. On the one hand, Hansa may be arguing that Cummins, through its forty-nine percent control of Mid-East, took title to the building in February 1967, and thus could not have relied on the clean bill of lading in May 1967, when it accepted the sight drafts. On the other hand, Hansa may be pointing out that the re-shipment contract between Taylor Woodrow and Cummins contained the same C.I.F. term as was present

in the Taylor Woodrow-Mid-East contract, and thus that Cummins took title to the building in Tripoli, prior to the issuance and negotiation of Hansa's bill of lading. Neither of these arguments, however, is relevant to a determination of Cummins' rights as against the *carrier*, because a C.I.F. term merely allocates the risk of loss of goods in transit as between the buyer and the *seller* (Taylor Woodrow). Gilmore & Black, The Law of Admiralty, 96, 97 (1957).

Thirdly, Hansa contends that Cummins unconditionally obligated itself to pay Taylor Woodrow for the building on March 30, 1967, that Cummins actually paid Taylor Woodrow the twenty-five percent down payment on April 24, 1967, and therefore Cummins did not change its position in reliance on the clean bill of lading by accepting the sight drafts approximately one month later. This argument, however, overlooks the fact that in a sale such as this one, requiring payment against documents, the purchaser's unconditional obligation to pay for the goods does not arise until presentment of drafts with a bill of lading attached. Uniform Commercial Code § 2-320(4); Gilmore & Black, *supra* at 99-104. And although Cummins did pay the twenty-five percent down payment before issuance of negotiation of the bill of lading, it had no reason at that time to believe that the cargo would be otherwise than in good order and condition.

Accordingly we hold that Cummins, like the consignees in *The CARSO, supra,* gave value in reliance on the bill of lading when, in May 1967, it accepted the sight drafts with the clean bill of lading attached. Hansa was therefore estopped from attempting to show pre-shipment damage; and because Hansa did not carry its burden of disproving negligence or unseaworthiness or of establishing one of the exceptions to liability under COGSA, we hold that the trial court properly resolved the question of liability favorably to Cummins.

We turn briefly to the question of damage. The basis for the trial court's computation was Mr. Howard's statement that the damages amounted to "seventy-five percent of the cost of the building." The trial court multiplied this percentage by the invoice cost of the building in London, roughly $50,000, and subtracted the $1,000 in salvage sale proceeds from the resulting amount, yielding a net recovery of roughly $27,000 (plus incidental expenses, interest, and costs). In our view, this method of computing damages was erroneous, reflecting a misinterpretation of Mr. Howard's testimony. As Mr. Howard later explained, the seventy-five percent figure did not represent a monetary estimate of the extent of the damage or the cost of repair or replacement. Rather, it was an estimate of the number of components, by quantity, that had suffered some damage, from minor damage to complete destruction. Thus, the percentage figure was not intended to serve as the basis for computation of money damages.

At the same time, we must reject Cummin's claim that the cargo was a constructive total loss, even under the liberal American rule that a constructive total loss occurs if costs of repair or replacement exceed one-half the value of the cargo. Gilmore & Black *supra* at 77. Aside from Mr. Howard's seventy-five percent figure, which, as we have seen, cannot be translated into a monetary damage estimate, the trial produced estimates of repair and replacement costs ranging from $10,690 to a maximum of $20,000 Cummins offered evidence that the sound value of the components in 1967 was $41,275; that the invoice cost was $50,307.60; and that the insured value was $55,326.19. It is apparent that the highest meaningful estimate of damage $20,000) did not exceed one-half of even the lowest of these valuations ($41,275).

We therefore remand the case for redetermination of damages. Upon remand, the trial court should apply the

long-settled rule that the measure of damages is the difference between the market value of the cargo in sound condition in Houston on the date the GOLDENFELS arrived (June 26, 1967), and the market value of the damaged cargo in Houston at that time. *See, e.g., Encyclopaedia Brittanica, Inc. v. S.S. HONG KONG PRODUCER,* 2d Cir. 1969, 422 F.2d 7, *Holden v. S.S. KENDALL FISH,* 5th Cir. 1968, 395 F.2d 910; *Atlantic Mutual Insurance Company v. Poseidon Schiffahrt,* 7th Cir. 1963, 313 F.2d 872. Absent other evidence of the market value of the damaged cargo in Houston on the date of outturn, the proceeds of the salvage sale may be taken as establishing the market value. If no market for the cargo in sound condition existed in Houston on or about June 26, 1967, then Cummins is entitled to the reasonable cost of repairs.

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-302

DEUTSCHE DAMPFSCHIFF. GES. "HANSA",
Petitioner,
v.
CUMMINS SALES & SERVICE, INC.,
Respondent,
LONDON & OVERSEAS INSURANCE COMPANY
And PROVINCIAL INSURANCE COMPANY,
Respondents.

Brief In Opposition To A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit Of Respondents London & Overseas Insurance Company And Provincial Insurance Company

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To The Honorable, The Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:

London and Overseas Insurance Company and Provincial Insurance Company, Respondents, pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed in the above case be denied.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petition for a Writ of Certiorari is worded so that this Court might conclude that the courts below held as a matter of fact that Cummins Sales & Service, Inc. (hereinafter "Cummins") did not rely on the representations contained in the bill of lading when it executed sight drafts against the bill of lading. The District Court specifically found that after the cargo was shipped from Tripoli, the subject bill of lading was forwarded to the Republic National Bank in Dallas, Texas and negotiated to Cummins in due course. The United States Court of Appeals for the Fifth Circuit found that although Cummins did pay the twenty-five percent down payment before issuance or negotiation of the bill of lading, it had no reason at that time to believe the cargo was not in good order and condition. The United States Court of Appeals correctly held that Cummins gave value in reliance on the bill of lading when in May, 1967, it accepted the sight drafts with the clean bill of lading attached.

The lower courts also correctly held that the condition of the containers would account for the damage to the cargo itself, thus the Plaintiff had no burden of proof as to the actual condition of the contents prior to delivery to the shipowner.

Petitioner contends that the measure of damages is a "Question Presented" although the point is not argued or discussed elsewhere in the Petition.

ARGUMENT

Petitioner argues that the lower courts misapplied the law. This is simply not accurate. The District Court correctly held that the arrangements for shipment had not been made by Cummins but by Taylor Woodrow, the original seller of the goods. Petitioner contends that because part of the purchase price was paid prior to the time the cargo was loaded aboard the vessel, that the bill of lading subsequently issued, is of no effect. Respondents respectfully submit that most sales are made prior to the time cargo is loaded aboard a ship, and that frequently small down-payments are made. However, Cummins was not entitled to claim the cargo without the bill of lading. In order to obtain the bill of lading, Cummins unconditionally pledged its credit on reliance on representations contained in the bill of lading.

Statements in the bill of lading as to order and condition of the goods when received are binding on the shipowner when the bill of lading is negotiated to a bona fide transferee for value who has purchased the bill of lading on the faith that the statements therein contained are correct. *CONCORDIA STAR*, 250 F.2d 867 (2d Cir. 1958); *The CARSO*, 53 F.2d 374 (2d Cir. 1931); *The RADJA*, 114 F. Supp. 456, (N.D. Cal. 1953); *Oliver Strawgoods Corporation v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928). As was stated in *The CARSO*, 43 F.2d 736 (S.D. N.Y. 1930), aff'd 53 F.2d 374 (2nd Cir. 1931) at page 744:

> "The real question involved in a case like this is whether the consignee of a straight bill of lading or the endorsee of a negotiable bill of lading, knows when he pays his money or pledges his credit, that the representation as to the condition of the goods by the shipowner is false. If he does not know of the misrepresentation, the shipowner must stand by his statement of condition."

Petitioner is correct in its assertion that a shipowner is not estopped from proving the actual condition of goods upon delivery to its vessel who had previously purchased the goods without reliance on a receipt or bill of lading. However, as a matter of fact, the lower courts found that the consignee in this case had relied on the bill of lading. The shipowner is thus estopped and the lower courts' opinions are correct.

Petitioner complains that Cummins failed to carry its burden of proof as to the condition of the contents of the containers at the time of delivery to the shipowner. The evidence was uncontradicted at the trial that the shipping crates, boxes and cartons at the time of discharge in Houston were badly damaged. Such was obviously not the condition of the shipping crates at the time they were delivered to the vessel in Tripoli. The chief mate on the GOLDENFELS stated that he saw only one crate with exterior damage in Tripoli. Where goods are shipped in apparent good order and condition, and arrive damaged and the containers at the time of delivery are in such condition as to account for the damage to the contents, it is not necessary for the claimant to prove good order of the contents at the time of shipment. *The SOLVEIG*, 217 Fed. 805 (N.D. Cal. 1914); *The CIANO*, 69 F.

Supp. 35, (E.D. Pa. 1946); *The SHICKSHINNY*, 227 F.2d 348 (2d Cir. 1955).

Although in the Petition for Writ of Certiorari, Petitioner contends that a "Question Presented" is the measure which should be applied to establish damage, the point was thereafter not discussed, nor argued. The question of damages has been remanded to the District Court for further determination anyway.

There is no conflict among the circuits of the several Courts of Appeal as stated in the Petition as the concepts of law stated in the opinion of the Court of Appeals in this case are correct and held uniformly by all circuits.

There is no unwarranted and new concept relating to the documents used in international shipping as Petitioner contends was injected in this case. There was simply a finding by both lower courts that Cummins relied on the representations contained in the Hansa bill of lading in pledging its credit and had no notice, actual or constructive, of damage to the cargo before it arrived in Houston; that Petitioner was therefore estopped to prove preshipment damage as to Cummins who was a bona fide purchaser for value.

Hansa is prima facie liable for damages to cargo which occurred in its care and custody. Hansa did not exonerate itself from liability for the damages which occurred while the cargo was in its care and custody. Furthermore, Hansa did not prove the extent that pre-shipment damage, if any, contributed to the overall loss, and it is therefore liable for all of the damages.

CONCLUSION

The lower courts correctly found the facts, and applied the law. There is no conflict with the opinion of the Court of Appeals and this Court or any other Court of Appeals. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that copies of the foregoing Reply in Opposition to Petition for Writ of Certiorari have been served on Petitioner by mailing copy thereof to Robert M. Julian, Esq., First City National Bank Building, Houston, Texas, and attorneys for other respondents herein, Mr. B. D. McKinney, Baker & Botts, One Shell Plaza, Houston, Texas, on the 12th day of September, 1973, in securely sealed, postage paid envelopes, correctly addressed to their respective addresses of record.

Jon W. Montague
JON W. MONTAGUE